United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7133

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P/S

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

In the Matter of

TARGET ROCK CORPORATION

Petitioner-Appellant

v.

LOCAL 431, INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO

Respondent-Appellee

On Appeal from a Decision of the
United States District Court for the Eastern District of New York

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APPELLEE'S BRIEF

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Appellee
1501 Broadway
New York, New York 10036
(212) 354-8330

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Everett E. Lewis
David M. Eisenberg
Of Counsel

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ISSUE PRESENTED

Did the District Court correctly decide, as a matter of law, that a dispute between Target Rock Corporation and Local 431 concerning major medical benefits is arbitrable under the parties' collective bargaining agreement?*

STATEMENT OF THE CASE

Appellant Target Rock Corporation originally commenced this proceeding in the Supreme Court of the State of New York, seeking to stay the arbitration of a dispute concerning major medical benefits, in which Appellee Local 431 filed a demand for arbitration on or about February 26, 1976. Local 431 removed the matter to the U.S. District Court for the Eastern District of New York, and counterclaimed to compel arbitration pursuant to Section 301 of the Labor-Management Relations Act (29 U.S.C. §185). Target Rock replied to the counterclaim and both parties moved for summary judgment in the District Court.

On February 15, 1977, a U.S. District Judge George C. Pratt granted summary judgment in favor of Local 431, compelling arbitration. Judge Pratt's Memorandum and Order appear in the Joint Appendix at pages A128-A132.

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*Appellee Local 431 takes strong exception to Appellant Target Rock's "Statement of Issues", in that Appellant characterizes the group insurance plan and the printed bargaining agreement as "wholly separate and distinct agreements". The District Court expressly rejected Appellant's contention that they are separate.

STATEMENT OF FACTS

Since 1969, a program of group insurance, collectively bargained for between Target Rock Corporation and Local 431, has been in effect for Target Rock employees (A105, A109, A116, A34). This program has been the subject of collective bargaining in every round of contract negotiations between the parties since 1969 (A118, see also A67-70), and has always been part of the overall collective bargaining agreement (A118). However, it has been the consistent past practice of the parties not to include the group insurance plan in the printed version of the collective bargaining agreement; instead, the plan has been printed separately, after the printing of the agreement, and has been expressly denominated "supplementary" to the agreement (A105, A109, A34). The principal reason for this separate "after-the-fact" publication of the plan is the substantial amount of time required for the insurance carrier to write the plan, a long and technical instrument (A119).

In negotiations for the 1975 collective bargaining agreement (the expiration date of the 1973 agreement was March 8, 1975), the parties agreed to add "major medical" coverage to the group insurance plan. The 1975 bargaining agreement was effectuated by a "stipulation of agreement" entered into on May 6, 1975, part 1 of which detailed all changes to be made in the 1973 agreement and part 2 of which set forth certain other agreements in addition to the contract changes (A122-27). Item 1(I) of the stipulation states as follows:

> 1. The collective bargaining agreement between the parties is hereby renewed, in all its terms and conditions for a further period, up to and including May 5, 1978, except as modified and set forth below:
>
> * * *
>
> I. Major Medical: Effective May 8, 1975, the Employer shall provide Major Medical coverage pursuant to the program outlined in the bargaining. (A122-24).

The printed version of the 1975 agreement was in precise accordance with the stipulation, making all of the changes to the 1973 agreement set forth therein, except that consistent with the past practice described above, the printed agreement made no mention of "major medical" or any other aspect of the group insurance plan. (Compare 1973 and 1975 printed agreements, A1 et seq. and A17 et seq.)

Major medical coverage was in fact implemented, and subsequent to the implementation, on or about February 18, 1976, the company came forward with a comprehensive printed version of the group insurance plan, including major medical coverage. Page 4, paragraph 7 of the plan, as in the case of previous plans, expressly states that the plan is "supplementary" to the printed collective bargaining agreement (A34). The beginning and ending "effective dates" of the plan (May 6, 1975-May 5, 1978) are identical to those of the 1975 Stipulation of Agreement and the 1975 printed bargaining agreement (A34, A122, A30).

On or about February 26, 1976, Local 431 asserting that certain elements of the plan's major medical coverage did not comport with the terms and conditions "outlined in the bargaining", filed a demand for arbitration, which has given rise to this proceeding (A119-20).

OPINION OF THE DISTRICT COURT

In its opinion below, the Court cited the strong national policy creating a presumption of arbitrability of claims where parties have entered into an agreement to arbitrate, and held that Target Rock failed to overcome that presumption (A129-131).

The parties' May 6, 1975 Stipulation of Agreement, which extended the previous collective bargaining agreement, and added major medical coverage to the agreement, was held to demonstrate the existence of a single collective bargaining agreement, encompassing both insurance benefits and terms of the printed bargaining agreement, notwithstanding the fact that that agreement may have subsequently been published in two or three separate brochures (A132). Judge Pratt further concluded that by adding an "obviously indefinite reference"* concerning major medical coverage to their agreement, "which already contained an arbitration clause presumptively applicable to the potential dispute, the parties must be deemed to have contemplated that resolution of the dispute over the meaning or interpretation of the phrase 'program outlined in the bargaining' would be by arbitration." (A131). The Court also relied on the fact that the parties "fail(ed) to exclude that dispute from arbitration by any language whatsoever, let alone that which is 'clear and unambiguous' or 'unmistakeably clear'", in ordering that the parties proceed to arbitration (A131-32).

Finally, the Court rejected Target Rock's argument that Local 431 was seeking to have an arbitrator "redraft" the

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*" ... the Employer shall provide Major Medical coverage pursuant to the program outlined in the bargaining".

parties' agreement, citing the agreement's prohibition against an arbitrator adding to, subtracting from, or modifying any of the terms of the agreement (A132).

ARGUMENT

THE DISTRICT COURT'S HOLDING THAT THE PARTIES' DISPUTE CONCERNING MAJOR MEDICAL BENEFITS IS ARBITRABLE UNDER THE COLLECTIVE BARGAINING AGREEMENT IS FULLY SUPPORTED BY THE RECORD, IS CORRECT AS A MATTER OF LAW, AND SHOULD BE AFFIRMED.

1. There is a strong "presumption of arbitrability" under federal law, which can only be rebutted by the most forceful evidence of a purpose to exclude a claim from arbitration.

This case concerns the arbitrability of a dispute over provisions of the major medical plan provided by Target Rock for its employees. Specifically, the plan as published by the company provides for a deductible for each illness; Local 431, contending that during collective bargaining, the parties agreed that the plan would provide for an annual deductible chargeable against all illnesses, has filed a demand for arbitration. Target Rock seeks to stay that arbitration, claiming that its major medical coverage is "wholly separate and apart from the collective bargaining agreement" and therefore not subject to its arbitration clause.

We note at the outset that where parties have provided for arbitration under a collective bargaining agreement, the "Steelworkers trilogy"* dictates that there is a strong pre-

*United Steelworkers of America v. American Manufacturing Company 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Company 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corporation 363 U.S. 593 (1960).

sumption of arbitrability of disputes between the parties. In United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the Supreme Court stated that:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute. Doubts should be resolved in favor of coverage." Id. at 582.
>
> "In the absence of any expressed provision excluding a particular grievance from arbitration" the Court held "we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." Id. at 584-585.

The Court has very recently reaffirmed these principles in Nolde Brothers, Inc. v. Local 358, Bakery & Confectionary Workers Union, AFL-CIO, 45 U.S.L.W. 4251, 4254-55 (U.S. March 7, 1977).

As Judge Pratt has duly noted (A129), this Court has therefore concluded that:

> it is "national policy" to encourage arbitration of labor disputes, that doubts as to arbitrability should be "resolved in favor of coverage", that language excluding certain disputes from arbitration must be "clear and unambiguous" or "unmistakenly clear", and that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute". This is an imposing litany for the Company to overcome.
> International Association of Machinists & Aerospace Workers v. General Electric Co., 406 F2d 1046, 1048 (2nd Cir. 1969).

As set forth below, the District Court in this case quite properly concluded that "the company has failed to overcome this litany." (A130).

2. Appellant Target Rock has failed to overcome the "presumption of arbitrability". Its contention that group insurance and major medical coverage are "wholly separate and distinct" from the balance of the collective bargaining agreement is without merit.

In holding that "the company has failed to overcome this litany", IAMAW v. General Electric Co., supra, Judge Pratt carefully considered, and rejected, Target Rock's claim that its major medical coverage is "wholly separate and apart" from the collective bargaining agreement (A128-29). This conclusion is fully supported by the record in this case. As the District Court opinion correctly observes, the parties' May 6, 1975 Stipulation of Agreement clearly demonstrates the non-separate nature of Target Rock's group insurance plan.

The parties 1973 collective bargaining agreement expired on March 8, 1975. On May 6, 1975, the parties extended their agreement, including its arbitration provisions*, for three

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* ARTICLE XXI - ARBITRATION

A. All disputes, differences and grievances arising over the application or interpretation of this agreement which have not been satisfactorily settled after following the grievance procedure herein set forth, shall be promptly submitted to arbitration before an Arbitrator who shall be selected from the American Arbitration Association in accordance with its rules, whose decision shall be final and binding on the parties.

* * *

C. The Arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement. (A11, A28).

additional years and added major medical coverage to the employees' benefits. The agreement was extended by means of a Stipulation of Agreement. The Stipulation provided, inter alia:

> 1. The collective bargaining agreement between the parties is hereby renewed, in all its terms and conditions for a further period, up to and including May 5, 1978, except as modified and set forth below:
>
> I. Major Medical: Effective May 6, 1975, the Employer shall provide Major Medical coverage pursuant to the program outlined in the bargaining. (A122-24).

Weighing the significance of the 1975 contract negotiations and agreement, the Court concluded that:

> By their May 6, 1975 Stipulation of Agreement the parties added major medical coverage to the employees' benefits. What specific coverage was to be added? Although now at loggerheads over the question, the parties in May 1975 apparently were in agreement that what was to be added was "the program outlined in the bargaining". By adding this obviously indefinite reference in their agreement which already contained an arbitration clause presumptively applicable by national policy to the potential dispute, the parties must be deemed to have contemplated that resolution of the dispute over the meaning or interpretation of the phrase "program outlined in the bargaining" would be by arbitration. Their failure to exclude that dispute from arbitration by any language whatsoever, let alone that which is "clear and unambiguous" or "unmistakenly clear", compels the conclusion that arbitration is called for here.

> Petitioner's assertions to the contrary are not persuasive. That the results of the collective bargaining process are published in two or three separate brochures does not vitiate the existence of a single collective bargaining agreement evidenced in the document executed May 6, 1975. (A131-32).

On this appeal, Target Rock, now, for the first time, claims that the May 6, 1975 Stipulation of Agreement was merely a "settlement stipulation", which was merged into the subsequent "formal" printed bargaining agreement (Appellant's brief, p. 15). This interpretation is totally at odds with the undisputed facts of this case. The Stipulation set forth all of the changes to be made in the text of 1973 agreement, and these charges were in fact made, exactly as set forth in the Stipulation, in the 1975 printed agreement. (Compare the 1973 printed agreement, A1 et seq., and the 1975 printed agreement, A17 et seq.) The Stipulation also dictated that major medical coverage be initiated "effective May 6, 1975", and major medical coverage was implemented, in an insurance plan dated back to May 6, 1975 (although the plan was drawn up well after that date). Part 2 of the Stipulation set forth various other agreements, which were acted upon. In sum, the Stipulation represented the full understanding of the parties based upon their negotiations for a new contract. The parties intentions never changed, and they engaged in no renegotiations prior to the preparation of the printed bargaining agreement.

The reasons for printing the "bargaining agreement" first and the insurance plan later are quite simple. As Target Rock states in its brief (p. 15), the printed agreement was prepared very shortly after the execution of the stipulation.

This reflects a rather basic fact-of-life under a collective bargaining agreement: i.e. it is essential to day-to-day operations that the parties' representatives in the shop -- shop stewards and supervisors alike -- have access to a current printed bargaining agreement to which they can refer. Given the parties' desire to make such a printed agreement available with any degree of promptness at all, incorporation of the insurance plan into this agreement, either directly, or by reference, absolutely could not be achieved. Separate "after-the-fact" publication of the plan is necessitated by the fact that once the parties agree upon insurance coverage, it takes the insurance carrier a very substantial amount of time to write the plan, a long and technical instrument.* In fact, although major medical coverage was implemented quite some time earlier, the company was unable to come forward with the present group insurance plan (dated May 6, 1975, the date of the Stipulation), until on or about February 18, 1976, some 9 months after the parties had entered into their agreement (A119).**

In light of the foregoing, it is quite clear that the Stipulation of Agreement was not "reduced" to and did not "merge" into the printed bargaining agreement. Rather, the various negotiated changes reflected in the Stipulation were

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*Part 2(c)(4) of the Stipulation shows that once the parties had agreed to add major medical coverage to the bargaining agreement (Part 1(I)), it was then incumbent upon the company to have the plan drawn up (A125).

**While the parties were thus unable to insurance plan into the printed agreement by direct incorporation or "incorporation by reference", the insurance plan was, by its own terms, expressly denominated as "supplementary" to the bargaining agreement. See discussion, infra, at p.11-12.

merely integrated into the new printed agreement.

Target Rock's claim that the insurance agreement is wholly separate from the bargaining agreement is further undermined by the exact coincidence of effective dates of the Stipulation, the printed agreement, and the group insurance plan. In all 3 cases, the effective dates run from May 6, 1975 through May 5, 1978 (A122, A30, A37). Were the insurance plan genuinely independent of the bargaining agreement, there would have been no reason to have its effective dates concide exactly with those of the Stipulation and printed agreement.

To further support its position that major medical benefits are separate and apart from the collective bargaining agreement, Target Rock argues that "Not one of the four collective bargaining agreements between the parties has ever made any mention or reference whatsoever to health insurance or the entirely separate agreement between the parties which covers health insurance". (Appellant's brief, p. 10). This is a remarkable assertion in light of the fact that insurance benefits have been the subject of bargaining in every single round of contract negotiations between the parties since 1969 (A118; see also Appellant's brief, pp. 4-6), and that each and every group insurance plan has, expressly, by its own terms, been deemed "supplementary" to the collective bargaining agreement.*

*This agreement shall be supplementary to the Collective Bargaining Agreement between the parties hereto and amended as of the 27th day of January 1971, the 8th day of March 1973 and the 6th day of May 1975,and shall continue in effect until midnight, May 5, 1978." 1975 Group Insurance Agreement, paragraph 7, at A37. Similarly, see previous group insurance agreements, at A108 and A109.

Particularly in light of the fact that the parties have so linked the group insurance agreement to the balance of the bargaining agreement, the absence of any limiting language whatsoever which would exclude this matter from arbitration is of critical importance. * Had the parties wished to so exclude the matter they could easily have done so in either the insurance agreement, or in the printed agreement itself, and would never have characterized the insurance plan as a "supplement" to the printed agreement without further explanation or limitation. Indeed, if the parties had so intended, they could have said that the insurance plan was separate from (rather than "supplementary to") the printed agreement, and not subject to its arbitration provisions. We further note that in other provisions of the contract, the parties have seen fit to expressly exclude certain matters from arbitration. For example, the provisions of both the 1973 and 1975 printed agreements covering

* Cf Bressette v. International Talc Co., 527 F.2d 211 (2nd Cir. 1975). In Bressette, the parties had entered into a pension agreement, printed separately from the principal bargaining agreement, and with an arbitration clause of its own. The bargaining agreement did not expressly incorporate the pension plan, and in a section of the agreement covering miscellaneous matters merely stated that, "It is noted herewith that there is a signed agreement concerning a Pension," and set forth certain negotiated changes in the pension plan. The Court held that this mention of the pension plan in the bargaining agreement was sufficient to bring it within the coverage of the agreement's arbitration clause, even though the pension plan was printed separately and had an arbitration clause of its own with language excluding various matters from the bargaining agreement arbitration clause. 527 F.2d at 216. We submit that the language of the insurance plan describing the plan as "supplementary" to the printed agreement provides at least as strong a nexus as the language in Bressette, and similarly compels the conclusion that the insurance plan falls within the coverage of the printed agreement's arbitration clause.

newly-hired employees ("Article XIII-Trial Period") expressly provide that a new employee who is discharged within 60 days of his date of hire has no recourse to the contractual grievance/arbitration procedures (A8, A24).

Thus, as the District Court concluded (A131-132), the parties' "failure to exclude [the dispute over insurance benefits] from arbitration by any language whatsoever, let alone that which is 'clear and unambiguous' or 'unmistakeably clear', compels the conclusion that arbitration is called for here." See Nolde Brothers, Inc. v. Local 358, Bakery & Confectionary Workers, supra, 45 U.S.L.W. at 4254; United Steelworkers of America v. Warrior & Gulf Navigation Co., supra, 363 U.S. at 584-85; International Association of Machinists & Aerospace Workers v. General Electric Co., supra, 406 F.2d at 1048; Bressette v. International Talc Co., 527 F.2d 211, 216 (2nd Cir. 1975).

For the reasons set forth above, we submit that the District Court correctly determined that Target Rock's group insurance plan is part of the overall collective bargaining agreement and is subject to its arbitration clause.

3. Target Rock's claim that Local 431 is seeking arbitration "as a substitute for negotiations", and seeks to "rewrite" the agreement rather than have it interpreted, is without merit.

In claiming that Local 431 seeks arbitration "as a substitute for negotiations", and seeks to "rewrite" the agreement, Target Rock misstates both the position of Local 431, and the holding of the District Court.

Without belaboring the details of Target Rock's misconception of Local 431's claim, we simply note that the District Court's understanding of the union's claim was precisely correct, i.e.: " ... the union alleges that during collective bargaining the parties agreed that the plan would provide for an annual deductible chargeable against all illnesses." (A129). Local 431 claims that since an annual deductible was part of the "program outlined in the bargaining", Target Rock breached Article 1(I) of the Stipulation of Agreement by instituting a deductible different from that agreed to in the bargaining. This is in the purest sense a "dispute arising over the application of the agreement," arbitrable under Article XXI of the bargaining agreement.*

If the Company is correct in its assertion that the details as to the major medical deductible were not agreed to in the bargaining, and with the assent of the Union were left for the company to determine, then an arbitrator will obviously find that an annual deductible was not outlined in the bargaining, and will dismiss Local 431's grievance. Such questions of fact are for the arbitrator to decide. United Steelworkers v. American Mfg. Co. supra, 363 U.S. at 567-68; Bressette v. Int'l Talc Co., supra, 527 F.2d at 216.

*Thus, even if the company's refusal to implement an allegedly agreed-upon benefit is arguably a violation of section 8(a) (5) of the Labor Management Relations Act ("refusal to bargain"), this only means that the Union has alternative forums in which it may seek its remedy. This is a very common circumstance, and in many such cases the NLRB may defer to the arbitral process. See Collyer Insulated Wire, 192 NLRB 837 (1971).

Quite contrary to Target Rock's assertion that the District Court was "leaving to an outsider the job of negotiating" major medical coverage (Appellant's brief, p. 15), Judge Pratt expressly cautioned that an arbitrator could not "redraft" the agreement, because the arbitration clause constrains him from adding to, subtracting from, or modifying the agreement (A132). If an arbitrator so exceeded his power, his award might well be subject to reversal in federal court. Torrington Co. v. Metal Products Workers Union, Local 1645, 362 F.2d 677 (2d Cir. 1966).

Target Rock makes much of the fact that Local 431 has not signed the insurance plan, and the company is apparently claiming that the plan is in effect an unexecuted agreement. However, the fact remains that upon the mutual assent of the parties, the plan has been in full force and effect since it was drawn, without interruption. The sole reason that Local 431 has not signed the plan document is that it did not want to waive its right to object to the deductible provision.

Local 431 seeks only to have the company comply with what was agreed to in negotiations, and is entitled to pursue its remedies under the agreement's arbitration clause.

CONCLUSION

On the basis of the foregoing, we respectfully urge that the order of the District Court compelling arbitration be affirmed, and that the parties be ordered to proceed to arbitration forthwith.

Respectfully submitted,

VLADECK,ELIAS,VLADECK & LEWIS,P.C.
Attorneys for Local 431
1501 Broadway
New York, New York 10036
(212) 354-8330

Everett E. Lewis
David M. Eisenberg
Of Counsel

AFFIDAVIT OF SERVICE

ROBERT TRIVIER being sworn says: I am not a party to the action, am over 18 years of age and reside at New York, New York.

On April 19, 1977, I served ~~a~~ 2 true copy 155 of the annexed Appellee's Brief by delivering the same personally to the persons and at the address indicated below:

RAINS, POGREBIN & SCHER
110 East 59th Street
New York, New York 10022

Robert Trivier
ROBERT TRIVIER

Sworn to before me this
19th day of April, 1977

David M. Eisenberg

DAVID M. EISENBERG
Notary Public, State of New York
No. 24-4542237
Qualified in Kings County
Commission Expires March 30, 1978